SCC Number: 37518

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR)

BETWEEN:

SEAN PATRICK MILLS

APPELLANT
(Respondent)

and

HER MAJESTY THE QUEEN

RESPONDENT
(Appellant)

and

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INTERVENERS

FACTUM OF THE INTERVENER ATTORNEY GENERAL OF BRITISH COLUMBIA

Rule 42, *Rules of the Supreme Court of Canada*

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. As with the appeal in *R. v. Reeves*[1] to be heard on May 17, 2018, this appeal deals with the ongoing convergence of informational privacy and technological progress. Ubiquitous use of text-based digital communications has led to the recording of enormous numbers of personal messages, either deliberately or unintentionally by default operation of software. These communications may be located on a sender or recipient's device, any device to which a message has been forwarded, a service provider's facilities anywhere in the world, or any combination of these places. Storage of the messages may occur for an indefinite period of time.

2. If an objectively reasonable expectation of privacy is found in the circumstances herein, it will confer an expectation of privacy on all sent or stored communications in virtually any circumstances. This would be contrary to this Court's decision in *R. v. Marakah.*[2] That decision did not confer privacy in all such situations, but rather held there would virtually always be standing to challenge admissibility. These are not synonymous. Rather the objective reasonableness of the expectation must be evaluated on a case-by-case basis against normative considerations in accordance with the tests set by this Court.

3. If the appeal succeeds, it will also unduly expand the scope of Part VI of the *Criminal Code* far beyond its intended ambit to include the search and seizure of pre-existing evidence. The definition of "interception" would then necessarily include the acquisition of retained copies of personal communication contrary to this Court's decision in *R. v. Jones*.[3]

4. *R. v. Duarte*[4] does not support the Appellant's position. It was decided in a factual matrix which no longer exists. The principles in *Duarte* were not made in contemplation of current communications technology, nor measured against the completely different normative expectations of today's society.

5. As a matter of public policy, in these circumstances there should be no requirement for prior judicial authorization to obtain a suspect's communications for use as evidence when those communications themselves are the *actus reus* of the offence. Undercover investigations of the

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[1] *R. v. Reeves*, SCC Docket Number 37676
[2] *R. v. Marakah*, 2017 SCC 59
[3] *R. v. Jones*, 2017 SCC 60
[4] *R. v. Duarte*, [1990] 1 S.C.R. 30

sort at issue here are most often undertaken as a proactive attempt to shield children from the actions of offenders, which is infinitely to preferable to investigating the aftermath of serious and violent crimes against some of society's most vulnerable members.

6. The Attorney General of British Columbia (AGBC) agrees with the respondent's overview but takes no position on the facts of this appeal.

PART II – INTERVENER'S POSITION ON APPEAL

7. The AGBC intervenes to address the issue of the objectively reasonable expectation of privacy in sent communications in the context of an anonymous undercover police investigation. This appeal raises far-ranging issues including, the normative expectations of privacy in such circumstances; the applicability of "risk analysis" and "normative considerations" in the context of text-based digital communications; and the applicability of *Duarte* to communications technology which creates a permanent record without any state action.

8. *ISSUE 1: Did the Appellant have a reasonable expectation of privacy in the communications?* The AGBC submits there is no objectively reasonable expectation of privacy in sent communications in these circumstances.

9. *ISSUE 2: Did the seizure of the communications breach section 8 of the Charter?* The AGBC submits state acquisition of the communications in these circumstances did not infringe s.8 nor require prior judicial authorization.

10. *ISSUE 3: If section 8 were breached, what is the appropriate remedy?* The AGBC makes no submissions on this issue.

PART III – STATEMENT OF ARGUMENT

11. The AGBC adopts the legal position of the respondent in relation to issues 1 and 2 and offers the following submissions in support.

A. NO OBJECTIVELY REASONABLE EXPECTATION OF PRIVACY

12. This Court noted in *Marakah*:

> [51] The second scenario is where the police, for whatever reason, access an offensive or threatening text message without obtaining prior judicial authorization. On this

> scenario, **depending on the totality of the circumstances, the accused may have a reasonable expectation of privacy in the text message and therefore have standing to argue that the text message should be excluded. Standing is merely the opportunity to argue one's case. It does not follow that the accused's argument will succeed**, or that the search of the text message will be found to violate s. 8. While a warrantless search is presumptively unreasonable under s. 8, it is open to the Crown to establish on a balance of probabilities that the search was authorized by law, the law is reasonable, and the search was carried out in a reasonable manner: see *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265, at p. 278.
>
> **[Emphasis added]**

13. A clear example of this is the British Columbia Court of Appeal's (BCCA) finding in *R. v. Pelucco*[5]:

> [61] It is because the objective reasonableness of an expectation of privacy includes normative elements that I am of the view that the analysis in *Sandhu* cannot be sustained. In that case, the judge found that the sender of a threatening text message had an objectively reasonable expectation that the recipient would not turn the message over to police. If objective reasonableness were merely a measure of probability, it could be said that the sender had an objectively reasonable expectation of privacy – he could reasonably expect that the threat would be sufficient to silence the victim and his message would, therefore, remain private. **Once normative elements of reasonableness are recognized, however, it becomes clear that a person who threatens another has no right to expect that the person who has been threatened will keep the threat private.**
>
> **Emphasis Added**

14. The logic and principles underpinning this finding in *Pelucco* must necessarily apply to situations of on-line child exploitation. Applying the "normative elements of reasonableness", a person anonymously communicating with a child to facilitate offences against that child has no right to expect the child (or a parent or police investigator pretending to be a child) will keep those communications private. The notion of reasonably expecting a victim to respect the privacy of the offender is ludicrous; no offender could, on normative standards, expect a victim to keep criminal behavior a secret. To legally construct an expectation of privacy in these scenarios has the effect of shielding the exploitation inherent in these victim-offender relationships. This differs fundamentally from the communications between organized criminals as in both *Marakah* and *Pelucco*. In those instances those communicating knew who they were speaking to and expected *each other* to prevent their texts from coming to the attention of the police.

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[5] *R. v. Pelucco*, 2015 BCCA 370. See also *R. v. Vickerson*, 2018 BCCA 39

15. This does not offend the notion of "content neutrality". It is not the content which governs the objective reasonableness in this situation. Rather it is based on the nature of the relationship between the parties: the anonymity of both the sender and the receiver, the offender's knowledge that a criminal offence is planned against the recipient of the communication and the normative expectation that victims of crimes will report them to police. In these circumstances, the actual content of the communication does not bear heavily on the normative considerations which govern.

16. The dissent in *Marakah* specifically references the circumstances before the Court in this appeal:

> [168] In sum, as I read her reasons, the Chief Justice effectively holds that everyone has a reasonable expectation of privacy in text message conversations, even when those conversations are on another person's phone. As such, under her all-encompassing approach to standing, even a sexual predator who lures a child into committing sexual acts and then threatens to kill the child if he or she tells anyone will retain a reasonable expectation of privacy in the text message conversations on the child's phone. Likewise, an abusive ex-husband who sends harassing text messages to his ex-wife and threatens to harm her and their children if she goes to the police will retain a reasonable expectation of privacy in the text message conversations on the ex-wife's phone.

17. The majority of this Court held:

> [5] The conclusion that a text message conversation can, in some circumstances, attract a reasonable expectation of privacy does not lead inexorably to the conclusion that an exchange of electronic messages will always attract a reasonable expectation of privacy (see Moldaver J.'s reasons, at paras. 100 and 167-68); **whether a reasonable expectation of privacy in such a conversation is present in any particular case must be assessed on those facts by the trial judge.**

18. The AGBC submits it was clearly not the intent of this Court in *Marakah* to hold that an objectively reasonable expectation of privacy exists in all instances particularly in the circumstances like those in this appeal.

19. Similarly, following this Court's decision in *Marakah*, the Alberta Court of Appeal (ABCA) in *R. v. Beairsto*[6], found:

> [11] In *Marakah*, Rowe, J., speaking for the majority, emphasized that, in some cases, a text message sent and received can attract a reasonable expectation of privacy. The

[6] *R. v. Beairsto*, 2018 ABCA 118

> totality of the circumstances, inclusive of the following, will determine whether s. 8 *Charter* protection will be engaged. The claimant must establish (a) a direct interest in the subject matter of the search, (b) a subjective expectation of privacy in that subject matter, and (c) that the subjective expectation of privacy was objectively reasonable.
>
> [12] If the latter factor is not made out, standing to argue that the search was unreasonable will be rejected.

20. Part VI of the *Code* only applies to communications over which a reasonable expectation of privacy exists. If they do not, then the provisions of Part VI have no application. Section 183 of the *Code*[7] provides:

> "private communication" means any oral communication, or any telecommunication, that is made by an originator who is in Canada or is intended by the originator to be received by a person who is in Canada and **that is made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it**,…:"
>
> **[Emphasis Added]**

21. The AGBC submits this is dispositive of any submissions as to the application of the wiretap provisions. The messages in situations like this appeal are not sent in such "circumstances". If they are not objectively private, then neither this nor any other kind of prior judicial authorization is required.[8]

B. UNDERCOVER INVESTIGATIONS, INTERCEPTIONS AND NORMATIVE EXPECTATIONS

22. A person who enters into an internet conversation using an alias to speak with a person completely unknown to them, but for the purpose of committing an offence against that same underage person, cannot establish a reasonable expectation of privacy.

23. In this appeal, the undercover operator was the intended recipient of the messages, albeit the appellant anticipated he was communicating with a child. By using digital communications technology to talk to him, the Appellant accepted the risk that person he was speaking to might

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[7] *Criminal Code*, R.S.C. 1985, c. C-46. s. 183

[8] An example of the application of this principal in relation to Part VI is found in *R. v. N.J.S.*, 2014 BCSC 2658, para 70

"repeat" it and knew perfectly well the technical means he was using to communicate produced a record of what he wrote. This issue has been the subject of several trial level decisions.[9]

24. Interception involves the prospective authorization of police to monitor and record all of the communications of specified individuals in real time seeking evidence of past and anticipated criminal behavior. Acquisition of messages already delivered is outside the ambit of Part VI.

25. In *R. v. Belcourt*,[10] the BCCA dealt with the issue of the purported need for a Part VI order for historical messages. In *Belcourt* the Court wrote:

> [52] The mischief created by an overly broad application of the reasons in *Telus* is exemplified by *R. v. Sandhu*, 2014 BCSC 303. In that case, the court found that text messages sent by an accused and received and stored on the phone of an extortion victim were "intercepted" when read much later by the police. In my opinion, such a finding is clearly beyond the scope contemplated by the decision in *Telus*. With respect, the court in Sandhu focused too narrowly on the purported nature of the intrusion by the police into the privacy interest of the accused without regard to the character of the evidence that the police sought to acquire to aid in their investigation.
>
> [53] As the Crown points out in its factum, the reasoning in *Sandhu* is problematic because it would have the effect of requiring Part VI authorization for a plethora of investigative techniques that, as yet, have not and have never required such authorization. As a general principle, I consider the court in *Sandhu* erred in failing to closely consider the nature of the evidence sought to be obtained by police or the investigative technique to be used in obtaining the evidence. This error misdirected the court, resulting in an overbroad interpretation of Part VI.[11]

26. This is precisely the error the Appellant urges on this Court. In circumstances similar to this appeal, the undercover officer stands in the shoes of the intended victim. People like the Appellant use communications technology known by all to produce a written record on the sender's device, the receiver's device and often on a service provider's equipment. A record of the communication's content exists independently of any state action. In the same way the victim

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[9] Including: *R. v. Merritt*, 2017 ONSC 1648 at paras 43-47; *R. v. N.J.S.*, 2014 BCSC 2658, at paras 56-61; *R v. Graff*, 2015 ABQB 415, paras 62-66; *R. v. Caza*, 2012 BCSC 525, paras 47-50 appealed on other issues 2015 BCCA 374

[10] *R. v. Belcourt*, 2015 BCCA 126

[11] This was referred to by this Court in *R. v. Jones*, 2017 SCC 60 at para 69

in *Sandhu*[12] had the right to provide them to police without it constituting an "interception", so did the police have the right to use them in their investigation when in an undercover capacity.

27. The fact that police used software to capture communications which have already arrived at their computer does not transform their conduct into an interception. They are obliged to capture and preserve relevant evidence as their failure to do so can prejudice the ability of an accused to defend themselves. The use of software similar to "Snagit" referred to in this case is not possible unless the message has already arrived at the device being used by police. Such software does not intervene in the communication process. This software cannot be employed unless the message has arrived at the recipient's device and the communication process is complete.

28. Police have been judicially criticized for failing to ensure that relevant digital evidence is captured in the face of allegations of a s. 7 breach:

> [113] This decision should not be seen as endorsing the use of less-than-forensic-grade software to capture and preserve social media evidence. My conclusion that the police conduct did not reach a level of unacceptable negligence at the later stages of the investigation is driven, in large part, by three considerations: … **I expect that, if the police procedures do not improve, subsequent decisions may find the police action to be unreasonable.**[13]
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> **Emphasis Added**

29. Whether police use such software or simply print copies of their own received texts or emails should not govern whether their conduct amounts to an interception. Such a distinction would be entirely artificial. If police are not permitted to use such software, trial courts will be left to decide the facts based on the recollection of the officer, without benefit of the far more reliable and completely objective record that stored messages will afford. The transmission information gathered simultaneously may also be invaluable to an accused in making out a defence on identity. For example, it may allow them to establish they were nowhere near their computer at the time the message was sent, or that it originated from someone else's device.

30. The issue of interception in similar circumstances has recently been the subject of appellate discussion. The ABCA held in *R. v. Beairsto*:

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[12] *R. v. Sandhu*, 2014 BCSC 303
[13] *R. v. Hamdan*, 2017 BCSC 676

> [24] That said, neither *R. v. Marakah supra* nor *R. v. Jones*, 2017 SCC 60 (CanLII) resolves the question of whether the deception of an individual as to the identity of his or her interlocutor through the use of electronic communications, amounts to an interception. Simply put, as I see it, deception does not amount to an interception.
>
> [25] In my view, it is important to distinguish between the disclosure of found private communications and the interception of same. Where an investigation involves a basic deception as to whom the appellant is communicating with, absent intrusive technologies amounting to an "interference" between the recipient and the sender, no interception is made out. In *R. v. Mills*, 2017 NLCA 12 (CanLII) the Newfoundland Court of Appeal held that where there is direct communication between two parties, deception as to the identity of the recipient does not alter the nature of the communication or transform the "receipt by the intended recipient into an interception" (at paras. 13-16).[1] I respectfully agree.

C. DIGITAL COMMUNICATIONS, RISK ANALYSIS AND *DUARTE*

31. Twenty-eight years ago in *Duarte*, this Court held that prior judicial authorization was required by police in situations of "participant surveillance". Police conversing with suspects in an apartment were found to need prior authorization to place a "room bug" which recorded all that was said in the room. At that time, modern digital communications technology did not exist. Verbal conversations happened contemporaneously, that is either in-person or on a hard-wired telephone. Written communications occurred by rendering words on paper and transmitting them by either post or facsimile.

32. It is trite to say the digital communications revolution, which has occurred since and continues now, has radically changed the way in which people communicate as well as the contents of their communications. No one in contemporary society can be unaware that using modern technology leaves a near permanent record of all internet activity including the content of communications.

33. As this Court found in *Duarte*, in 1990 no one expected a permanent record to be made by the state of their spoken conversations. By recording them, police converted the ephemeral spoken words into such a record. Text-based digital communications always leave a permanent record *independent of any state action*, so no similar conversion "in kind" takes place. As was stated in *Duarte*, there always remained the "risk" of the tattletale repeating spoken words to agents of the state. That was the normative expectation then; a permanent digital record in several "places" is the normative expectation now.

34. The modern “tattletale” is the device and its software. Rather than the spoken words residing in the memory of a witness, they now reside on several devices simultaneously. Everyone using technology is aware of this fact. If the *Charter* was not infringed by a conversation being remembered by the participant in 1990, it cannot logically be infringed by digital storage now. The former is included in the normative expectations of three decades ago; the latter forms part of the normative expectations in 2018. That the bulk of our text-based communications are now recorded by machines as we use them is simply now an inescapable fact of life.

35. This Court wrote in *Duarte*:

> In my view, the above remarks demonstrate the fallacy of the conclusion that the risk of being recorded is simply a variant of the risk of having one's words disclosed by the person to whom we speak. Surreptitious electronic recording annihilates the very important right to determine to whom we speak, i.e., the right to choose the range of our auditors. As pointed out by Cirillo J., at p. 365, in the case of participant surveillance, a speaker no longer has any choice whether to disclose his private thoughts to the government.

36. In 2018, the “right to choose the range of our auditors” is not “annihilated” by the actions of the state, but rather by the progress of technology. Communications are recorded by the individuals doing the communicating, uncompelled by the state to do so. Anyone seeking to avoid the consequences of this reality may choose a different means of communication, albeit one which makes the secret exploitation of children more difficult for them.

37. If the concept of normative expectations is to mean anything, it must reflect the society as it is, not a fictional construct, nor days gone by, or it risks becoming mere sophistry. Similarly, applying the normative expectations of nearly three decades ago precludes the *Charter* from operating as a living document which adapts to reflect the values of the society for whose benefit it exists.

38. A normative assessment of the expectation of privacy in digital communications involves a judicial assessment of society’s values as they have evolved over time and currently exist. The values of Canadian society are not uniform. Instead, there exists a wide variance in attitudes regarding privacy in data. These range from people who take steps to ensure others do not have access to any of their information, to those who freely communicate intimate information and

images with people whose actual identities are unknown to them. It is neither logical nor empirically accurate to gauge an entire society's values by reference only to the perspective of one particular (and most conservative) segment. A true normative assessment cannot be based on a fictional construct of society's values that fails to account for its large variability.

39. The AGBC submits that the conservative and rigid application of the words used in *Duarte* now would expand the ambit of that authority far beyond its intended application. The test it contains requires reconsideration to ensure the values it enshrines are not distorted by failure to refer to modern technology and corresponding societal values. This Court's decision in *Marakah*, does not easily reconcile with the much older language used in *Duarte* making it subject to significant misinterpretation.

40. In *Jones*, this Court found that a wiretap order was not required to seize stored communications. Now the Court is asked by the Appellant to, in essence, reverse that decision and require it for copies already in existence on devices used by the intended participants. This potentially contradictory result highlights the need for *Duarte* to be reconsidered in light of modern realities. The AGBC submits that no judicial authorization and particularly no Part VI order ought to be required for anonymous, on-line undercover investigations. Normative expectations do not support a privacy interest in anonymously communicating with children (or persons the offender believes to be children) for the purpose of committing offences against them.

PART IV – SUBMISSIONS CONCERNING COSTS

41. The AGBC makes no submissions regarding costs.

PART V – ORDER SOUGHT

42. The AGBC makes no submissions as to the order sought.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Daniel M. Scanlan
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Attorney General for British Columbia

Dated this 9th day of May, 2018
at Victoria, British Columbia

PART VI – LIST OF AUTHORITIES

Para. No.

Statutory Provisions